

**UNPUBLISHED**  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF IOWA**  
**WESTERN DIVISION**

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
vs.  
  
JOSE ESPINOZA-NIETO,  
  
Defendant.

No. **CR01-4048MWB**

**REPORT AND RECOMMENDATION**  
**ON MOTION TO SUPPRESS**

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**I. INTRODUCTION**

On June 21, 2001, the defendant Jose Espinoza-Nieto (“Espinoza”) was indicted by a Grand Jury on one count of possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C). (See Doc. No. 1) On August 17, 2001, Espinoza filed a Motion to Suppress Evidence (Doc. No. 10). Espinoza filed a brief in support of his motion on August 20, 2001 (Doc. No. 11). The plaintiff (the “Government”) filed its resistance to the motion on August 31, 2001 (Doc. No. 14) The Trial Scheduling and Management Order entered July 20, 2001 (Doc. No. 7), assigned

motions to suppress in this case to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition.

The court held a hearing on the motion on September 4, 2001. Assistant United States Attorney Kevin Fletcher appeared on behalf of the Government. Espinoza appeared in person with his attorney, William C. Bracker. The Government offered the testimony of three witnesses, to-wit: Officer Kenneth Myers and Sgt. John Emswiler of the Denison Police Department, and Crawford County Sheriff's Deputy Michael L. Bremser. The defendant testified in his own behalf.

Espinoza offered the following four exhibits, all of which were admitted without objection: Defense Exhibit 1, a photocopy of the Nebraska driver's license of Emma Mendez and an identification card for Jose Antonio Espinoza Nieto; Defense Exhibit 2, a copy of a traffic citation issued to Emma Mendez on March 11, 2001; Defense Exhibit 3, a form entitled "Statement of Miranda Rights," signed by Officer Myers and showing "Subject's Name" as Jose Espinoza; and Defense Exhibit 4, a form entitled "Statement of Miranda Rights," signed by Officer Myers and Emma Mendez.

Both the Government and Espinoza submitted supplemental authorities on the issues raised at the hearing. (Doc. Nos. 17 & 18) The court has considered the evidence, reviewed the parties' briefs and supplemental authorities, and considers this matter fully submitted and ready for decision.

## ***II. FACTUAL BACKGROUND***

On March 10-11, 2001, Officer Kenneth Myers of the Denison Police Department was working the night shift, from 10:00 p.m. to 6:00 a.m., patrolling the streets of Denison, Iowa. Shortly after 1:20 a.m. on March 11th, Officer Myers was traveling northbound on 7th Street, approaching 1st Avenue North. He saw a full-size Chevrolet pickup truck with Nebraska license plates that was stopped or parked "nearly in the middle of the roadway in

the residential area there.”<sup>1</sup> The truck was in the eastbound lane in front of 803 1st Avenue North.<sup>2</sup> The truck’s taillights or brake lights were on, but because the truck was facing away from him, he could not tell if the headlights were on. Officer Myers saw a large person walk from the residence, which was dark, to the truck and get into the passenger’s side of the truck. The officer was unable to tell at that point anything about the passenger’s gender, race, or other physical characteristics, except to note the person was large. Although the officer could not tell for sure whether or not the truck was running, he said it pulled away just a second or two after the passenger got inside.

The officer testified 1st Avenue North is “a fairly quiet street.” There are houses on the north and south sides of the street, and a business at the corner on the north side of the street. Although there were other cars parked on the street, the only vehicles traveling on 1st Avenue North at this time were the officer’s patrol car and the pickup truck.

When the passenger got into the truck, the truck drove away. Officer Myers thought the truck was suspicious. It was stopped in a residential area in the middle of the night, in front of a house that was completely dark. The house was one in which officers suspected drug dealing activity took place. The truck was stopped near the middle of the roadway. A large person had come from the dark residence and gotten into the truck, which then drove away. The officer testified that “due to it being odd,” he decided to initiate a traffic stop to investigate.

The truck drove to 9th Street, turned left, and then turned north onto Avenue A. Officer Myers followed, but did not immediately turn on his emergency lights. He pulled

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<sup>1</sup>Officer Myers testified the roadway is about 15 feet wide on 1st Avenue North, with room for three normal-sized vehicles, side by side; *e.g.*, two traveling and one parked. The street is a two-way street. The truck was completely in its own lane; that is, no part of the truck was over the center line. However, it was several feet from the curb and looked to be near the center of the roadway.

<sup>2</sup>The officer first testified the individual was walking from the residence at 916 1st Avenue North. He later said the correct address was 803 1st Avenue North.

up behind the truck at the intersection of 1st Avenue North and 9th Street, and got the license number, although he did not call it in at that time. The truck made a legal left-hand turn onto 9th Street, with the patrol car following. The officer waited about 50 feet before turning on his emergency lights. He testified he wanted to wait until they had reached a well-lighted area before activating his emergency lights. He stopped the truck on Avenue A, about three blocks from the point where it was first seen. The truck responded immediately, and appropriately, to the emergency lights by pulling over and stopping.

By the time Officer Myers stopped the truck, Sgt. John Emswiler was following Officer Myers's patrol car. Sgt. Emswiler testified he, too, had seen the truck in the middle of 1st Avenue North,<sup>3</sup> but he was going the wrong direction to investigate. Sgt. Emswiler was aware the residence at which he had seen the truck was the home of Scott Schneckloth, known to law enforcement to be active in drug dealing. Justin Bigley (phonetic) also lived at the residence, and was rumored to be involved in drug activities. The officer turned around to go back and investigate, intending to stop the truck for parking or standing in the traveled portion of the roadway. By the time he went around the block, the truck was already pulling away and Officer Myers was following it. Sgt. Emswiler followed, to back up Officer Myers. He was about half a block behind Officer Myers at the time the latter activated his emergency lights.

When Officer Myers stopped the truck, he approached the driver's window. He immediately recognized the driver as Emma Mendez, a former employee at the police department's communications center in Denison. Mendez produced a Nebraska driver's license, but had no documentation for the vehicle. One passenger was in the truck, an Hispanic male, and he produced an identification card from Mexico, identifying him as Jose Antonio Espinoza Nieto. (See Def. Ex. 1) Officer Myers and Mendez went back to the

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<sup>3</sup>Sgt. Emswiler said he saw a purple truck, running, with its lights on, parked in front of a residence.

patrol car, where the officer ran a driver's license check on Mendez, and a wants and warrants check on Espinoza. Espinoza remained in the pickup truck. While waiting for the information he had requested, Officer Myers asked Mendez why she and Espinoza were in the area. She said they were looking for a guy named "Justin," to ask about a vehicle that was being repaired. After Mendez's driver's license information came back on the radio, Officer Myers asked Mendez who owned the truck. She said she did not know. Mendez told the officer Espinoza had contacted her to ask for a ride to Denison. Mendez told Espinoza her vehicle would not make it that far. Espinoza said he would provide a vehicle if she could make it as far as Omaha.

Officer Myers expressed his concern about the fact that Mendez had no documentation on the truck. (By this time, the officer had learned the truck was registered to a Pamela Rodriguez of Omaha, Nebraska.) He asked if there were any weapons in the vehicle. Mendez responded, "No," and added the officers were free to look, if they wanted to.<sup>4</sup> The officer testified the traffic stop was over when he asked Mendez if there were weapons in the truck.

By this time, Crawford County Sheriff's Deputy Michael Bremser also had arrived at the scene. Sgt. Emswiler had called Deputy Bremser to come to the scene to look at Espinoza and see if he might be an Hispanic male named "Renee" (phonetic), whom officers has been looking for in connection with a narcotics investigation. When Deputy Bremser arrived, he told Sgt. Emswiler he had never actually seen Renee and would not be able to identify him, but he did not believe Espinoza was Renee.

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<sup>4</sup>At some point during the traffic stop, Sgt. Emswiler asked Officer Myers who was in the truck. When Officer Myers said Mendez was the driver, Sgt. Emswiler said it would be a good idea to ask for consent to search the vehicle, "considering who was driving," and where the vehicle was stopped and the time of day. Sgt. Emswiler testified that when Mendez left her employment with the police department, there had been rumors, although no direct information, that she was involved in drug activities. Officers had seen Mendez with persons they previously had believed to be involved in drug activity. The record is not clear as to just when this conversation between Officer Myers and Sgt. Emswiler took place.

In the meantime, Officer Myers told Mendez to ask Espinoza to get out of the truck so the officers could look for weapons. The officer accompanied Mendez to the driver's side of the truck. As Mendez leaned in to tell Espinoza to get out, Officer Myers told Mendez, in a normal tone of voice, that he would like Espinoza to get out of the driver's side. Espinoza got out of the passenger's side and began walking toward the back of the truck. (None of the three officers at the scene actually heard what Mendez said to Espinoza, so none of them knew whether she spoke to Espinoza in English or in Spanish.) Up to that point, Espinoza had not exhibited any hostility, and generally was cooperative in demeanor.

Deputy Bremser met Espinoza on the passenger's side of the truck, and walked with him back toward the rear of the truck to speak with him. Sgt. Emswiler saw Espinoza get out and begin walking toward the rear of the truck. Sgt. Emswiler turned and started walking back toward his squad car. He testified he had no reason to be concerned about Espinoza at that point. He had never seen Espinoza before, and he had no prior information that Espinoza had any prior criminal history or involvement with weapons or drugs.

When Deputy Bremser and Espinoza reached the back of the truck, Deputy Bremser asked Espinoza if he had any weapons. Espinoza said, "No, no weapons." The officer then asked if Espinoza minded if the officer patted him down for weapons. Deputy Bremser testified Espinoza raised his arms up and spread them out to the sides, saying, "No problem, no problem." (The officer demonstrated on the stand how Espinoza raised his arms up, out, and away from his body.)

Deputy Bremser patted Espinoza down. Espinoza was wearing a large coat. In the right pocket of the coat, the deputy felt a large bulge that "felt like a softball." The officer asked Espinoza what was in his pocket. Espinoza put his hand into his pocket, and the officer immediately told him to take it out. When Espinoza complied, he had a large object in his hand wrapped in tinfoil; the officer said it looked like a baked potato. The officer

reached for Espinoza's hand. Espinoza pulled back and started to run away. Deputy Bremser yelled for him to stop, and began pursuing him. The other two officers heard Deputy Bremser yell, and they also joined in the pursuit. (Sgt. Emswiler stated it was about 15 minutes from the time the truck was stopped to the time Espinoza began to flee the scene.)

Deputy Bremser chased Espinoza through the backyard of a residence. After 50 or 60 yards, they cut back through an alley. Sgt. Emswiler saw Espinoza, followed by the other two officers, run around a shed behind a Mexican restaurant. Sgt. Emswiler went around the other side of the small building. When he came around the shed, Officer Myers and Deputy Bremser had apprehended Espinoza, and had him down on the ground, securing him. Deputy Bremser testified Espinoza slipped and fell on a large snow bank, Officer Myers came around the side of the building with his weapon drawn, and Espinoza surrendered. Officer Myers said they took Espinoza into custody "after a mild struggle." Espinoza was no longer carrying the aluminum foil object.

After the officers got Espinoza back to the patrol car, Deputy Bremser explained what had happened. The officers retraced the route of the chase, looking for the foil-wrapped object. Behind the restaurant, in the area where Espinoza was apprehended, there were several old appliances, including an open cooler similar to a produce cooler in a grocery store. The cooler was not plugged in, but was just sitting behind the restaurant. Deputy Bremser looked down into the cooler and saw what appeared to be the foil object he had seen in Espinoza's hand. The officer picked up the ball and opened it. It contained a large, pinkish-colored rock the officers believed to be methamphetamine. Sgt. Emswiler said the aluminum foil ball appeared to have been placed in the cooler very recently; it did not have frost on it.

From the scene, Officer Myers took Mendez to the jail, and she was escorted into a booking room. The record does not indicate who transported Espinoza to the jail, although

it was not Deputy Bremser, who testified he arrived at the jail after Espinoza did, in time to assist in the booking procedure. Prior to the deputy's arrival, Officer Myers had advised Espinoza of his *Miranda*<sup>5</sup> rights. Officer Myers said he read the rights to Espinoza in English from a printed form. Officer Myers said Espinoza waived his rights orally, but could not sign the waiver form because his hands were still handcuffed behind his back. Officer Myers recalled reading each of the rights to Espinoza, and asking Espinoza if he understood each right. He did not recall specifically what Espinoza answered, but the officer said if Espinoza had indicated he did not understand, or if the officer otherwise had felt Espinoza was not understanding what was being read to him, the officer would have provided Espinoza with a Spanish waiver form and would have called an interpreter. In this case, the Spanish form was not used and no interpreter was called, so the officer assumed Espinoza had indicated he understood.

Officer Myers asked Espinoza why he had run from the scene of the traffic stop. Espinoza said he was scared. The officer asked about the item in Espinoza's pocket, and Espinoza said he had gotten it from a guy in a bar, refusing to elaborate further. Officer Myers said Espinoza never indicated he did not understand the questions, and he responded to the officer's questions in English, although most answers were just a word or two or a short phrase, rather than complete sentences. The officer said Espinoza's answers were appropriate based on the questions asked. Espinoza never asked to speak to an attorney, and never indicated he did not want to speak further. Officer Myers testified he did not know whether Espinoza was familiar with the terms "attorney" or "court," and did not know if Espinoza had ever been to court in the United States.

When Espinoza was taken to the booking area, Deputy Bremser conducted a pat-down search and had Espinoza remove his personal items before placing him into a booking cell.

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<sup>5</sup>*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).



Deputy Bremser spoke with Espinoza briefly during that time. He made a comment about Espinoza's ability to run so fast in his boots, which the deputy recalled were snake skin cowboy boots. He also made a comment to Espinoza about the drugs, and Espinoza said the drugs were not his. Espinoza said someone had given him the drugs at a local bar. He said he knew the foil ball contained methamphetamine, but he was just holding onto it for someone else. Deputy Bremser said Espinoza responded appropriately to his commands and comments, and never indicated he did not understand the deputy's orders or questions. It appeared to the deputy that Espinoza understood English sufficiently to respond to commands and questions. For example, the deputy ordered Espinoza to take off his coat and the gold chains around his neck, and to put the chains into a bucket. He was also told to remove his socks and put them into the bucket. These directives were given in English. Espinoza immediately followed those directives.

Other items seized from Espinoza at the time of his arrest included his hair tie, which was the same type of tie that was on the wrapper of the bag inside the foil containing the suspected methamphetamine; a cell phone; and a little over \$2,000 in cash. Nothing was seized from the vehicle itself.

Officer Myers ultimately cited Mendez for violating Iowa Code section 321.354, which the officer believed prohibited stopping, standing, and parking in the traveled portion of a roadway. Sgt. Emswiler had planned to cite the vehicle's driver for violating the same statute. Both officers have since learned, as a result of the defendant's motion to suppress, that section 321.354 applies to stopping, standing, and parking on roadways *other than* in "a business district, rural residence district or residence district." However, Officer Myers noted section 321.361 requires the right-hand wheels of stopped or parked vehicles to be within eighteen inches of the curb. Both officers Myers and Emswiler testified the truck in question was farther than eighteen inches from the curb. Espinoza disagreed, testifying that when he got out of the truck, he stepped onto a sidewalk that ran all the way to the

curb. He also said the truck was parked the same distance from the curb as a blue car that was parked in the area.

On the issue of Espinoza's understanding of the English language, Sgt. Emswiler testified about another encounter he had had with Espinoza previously, in the spring of 2001. Officers were called to a trailer court with a report that Mendez's six-year-old daughter was missing. The child eventually was located at her father's home. During the course of the incident, Sgt. Emswiler had several conversations with Espinoza, including a walk-through of Espinoza's residence to be sure the child was not hiding somewhere inside. He said Espinoza conversed with him in English and had no problem understanding and responding to everything that was said. Among other things, Espinoza explained the trailer where he lived was owned by his father, who was trying to sell it.

### **III. ANALYSIS**

Preliminarily, the court makes the following findings of fact based on the evidence presented. The court finds Officer Myers and Sgt. Emswiler both saw the truck driven by Mendez as it sat in the roadway, more than eighteen inches from the curb, in front of a house where drug activity was suspected to take place. The house was dark, and the truck was running. Officer Myers saw Espinoza walk from the dark house and get into the passenger's side of the truck.

The court finds Espinoza had an understanding of the English language adequate for him to understand commands and questions put to him, and to understand his *Miranda* rights. Whether Espinoza waived his rights is discussed *infra*.

Significantly, the court also finds Espinoza consented to the pat-down search performed by Deputy Bremser. The deputy first asked Espinoza if he had any weapons, to which Espinoza replied, "No, no weapons." The deputy then asked if he could pat Espinoza down for weapons. Espinoza responded by saying, "No problem, no problem,"

and by raising his arms up and away from his body in a physical expression of consent to the pat-down search. The court finds it unnecessary to discuss the circumstances under which an officer may conduct a nonconsensual pat-down search for weapons<sup>6</sup>, because this pat-down search was consensual.<sup>7</sup> The court finds the evidence does not support Espinoza's argument that there was any form of subtle coercion or deception involved in the officer's request.

Once the officer felt the large bulge in Espinoza's pocket, the officer did not attempt to put his hands into the pocket. He asked Espinoza what was in his pocket, and Espinoza responded by putting his hand into the pocket. At that point, the officer reasonably asked Espinoza to remove his hand from his pocket. When Espinoza complied, he had the large, foil-wrapped ball in his hand. Nothing in these circumstances leads to a conclusion that Officer Myers violated Espinoza's Fourth Amendment rights.

Finally, the court finds that although the officers were in error as to the statutory basis for Mendez's citation, the officers nevertheless acted on the good faith belief that Mendez was violating Iowa law in stopping or parking the truck at the place in the roadway where it was seen. Moreover, their good faith belief was correct. The truck was parked illegally, although the officers were in error as to the appropriate statute being violated. The question of whether such circumstances supported the traffic stop is discussed in detail *infra*.

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<sup>6</sup>See, e.g., *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and its progeny.

<sup>7</sup>See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (voluntariness of consent to search is question of fact to be determined from totality of circumstances; knowledge of right to refuse is not prerequisite to consent; "no reason to believe . . . that the response to a policeman's question is presumptively coerced," *id.* at 247, 93 S. Ct. at 2058); *United States v. Martin*, 982 F.2d 1236 (8th Cir. 1993) ("A search conducted pursuant to a valid consent is constitutionally permissible.") (citing *Schneekloth*); *United States v. Pena-Saiz*, 161 F.3d 1175, 1177 (8th Cir. 1998); *United States v. Dupree*, 202 F.3d 1046, 1049-50 (8th Cir. 2000).

Having resolved these factual issues, the court turns to consideration of the following legal issues presented by Espinoza's motion: (1) was the traffic stop valid; (2) if the traffic stop was invalid, was Espinoza's consent to the pat-down search and subsequent flight from the scene sufficiently attenuated from the invalid stop to defeat an argument that discovery of the drugs was "fruit of the poisonous tree"; and (3) did Espinoza knowingly and willingly waive his *Miranda* rights?

The parties also raised, initially, the issue of whether Espinoza had a right to contest the officers' search of the truck. Because no evidence was seized from the truck, the court finds that issue to be moot, and does not consider it here.

#### **A. *Validity of Traffic Stop***

"As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89 (1996). See *United States v. Lyton*, 161 F.3d 1168, 1170 (8th Cir. 1998) ("Any traffic violation, even a minor one, gives an officer probable cause to stop the violator."); *United States v. Thomas*, 93 F.3d 479, 485 (8th Cir. 1996) ("Probable cause exists where an officer objectively has a reasonable basis for believing that the driver has breached a traffic law.").

In the present case, the question is whether the officers objectively had a reasonable basis for believing Mendez was violating the law. Espinoza claims the answer is "no", arguing:

[T]he belief of the officer is not the appropriate standard. If it were, illegal searches would be allowed in communities that failed to train [their] officers. "What they don't know can't result in suppressed evidence" simply does not promote the purpose of the exclusionary rule. The correct standard is whether the officer objectively had a reasonable basis for

believing the driver violated the law. The officer's basis is made on information known to the officer about the facts of the case, not about whether the officer did not know whether an act was legal or illegal.

(Doc. No. 18)

The Eighth Circuit disagrees with this interpretation. A somewhat analogous set of circumstances was involved in *United States v. Sanders*, 196 F.3d 910 (8th Cir. 1999). A South Dakota Highway Patrol officer stopped a truck that was towing a trailer, on the belief that South Dakota law required both of the trailer's taillights to be covered with red lenses. In actuality, the law provided an exception for trailers manufactured prior to July 1, 1973, requiring such trailers to have only one red taillight. The subject trailer fit within that exception. During the routine traffic stop, the officer discovered drugs and a handgun. Sanders, who was a passenger in the truck that was pulling the trailer, was convicted of being a felon in possession of a firearm. He moved to suppress all evidence seized as a result of the traffic stop, arguing the officer lacked probable cause to stop the truck because it was in compliance with South Dakota law.

Finding it unnecessary to reach an interpretation of the applicable statute, the Eighth Circuit held:

Regardless of whether or not the trailer actually was in violation of the South Dakota statute, Officer Jorgenson was justified in making the stop if he "objectively ha[d] a reasonable basis for believing that the driver had breached a traffic law." *United States v. Thomas*, 93 F.3d 479, 485 (8th Cir. 1996); accord *United States v. Dexter*, 165 F.3d 1120, 1124 (7th Cir. 1999). Even if the trailer was not technically in violation of the statute, Officer Jorgenson could have reasonably believed that the trailer violated the statute because one light was missing a red lens or because he believed that the trailer was manufactured after 1973. The determination of whether probable cause existed is not to be made with the vision of hindsight, but instead by looking to what the officer

reasonably knew at the time. *See Arizona v. Evans*, 514 U.S. 1, 17, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) (O'Connor, J., concurring). There is no indication in the record that Officer Jorgenson knew that the trailer was manufactured before 1973. . . . Finally, this Court should not expect state highway patrolmen to interpret the traffic laws with the subtlety and expertise of a criminal defense attorney. Officer Jorgenson saw a white taillight and believed that South Dakota law required such taillights to be red. Even if Officer Jorgenson was wrong, we cannot say that his belief was unreasonable. [FN3]

[FN3] There may be occasions when an officer's understanding of the law is simply unreasonable. In such a case, of course, the officer's belief that there is a traffic violation would not be sufficient to establish probable cause to stop the vehicle.

*Sanders*, 196 F.3d at 913 & n.3. *See also United States v. Wallace*, 213 F.3d 1216, 1220 (9th Cir. 2000) (officer was correct in believing a car's window tinting violated the law, although the law actually allowed darker tinting than the officer believed).

In the present case, there were no mistakes of fact on the officers' part, as there may have been in *Sanders*. There was, however, a mistake as to the particular statute that prohibits a vehicle from stopping or parking in the area of the roadway where the Mendez/Espinoza vehicle was seen. Nevertheless, it is incontrovertible that at that time of the traffic stop, Iowa law *did* prevent a vehicle from stopping or parking more than eighteen inches from the curb, albeit under a different statute than the one the officers believed applied. The court finds the officers' belief that the truck was stopped or parked in violation of the law was objectively reasonable and constituted probable cause for the traffic stop. *See Whren, supra; Lyton, supra*. This is true regardless of any underlying motivation for the stop beyond the suspected parking violation. *See United States v. Searcy*, 181 F.3d 975, 979 (8th Cir. 1999) (citing *Scott v. United States*, 436 U.S. 128, 138, (1978)).

Having found the traffic stop was valid, the court does not reach the question of whether Espinoza's consent to the pat-down search and subsequent flight from the scene were sufficiently attenuated from the traffic stop to validate the officers' seizure of the drugs and arrest of Espinoza.

### ***B. Waiver of Miranda Rights***

Espinoza seeks to suppress the statements he made after his *Miranda* rights were read to him, claiming he did not understand English sufficiently to understand those rights and, therefore, he could not have waived his rights voluntarily and knowingly.

“‘The determination of whether an accused has knowingly and voluntarily waived his *Miranda* rights depends on all the facts of each particular case.’” *United States v. Boyd*, 180 F.3d 967, 977 (8th Cir. 1999) (quoting *Stumes v. Solem*, 752 F.2d 317, 320 (8th Cir. 1985)). See *United States v. Barahona*, 990 F.2d 412, 418 (8th Cir. 1993) (government bears burden of proving by preponderance of evidence that defendant knowingly, voluntarily, and intelligently waived his rights); *United States v. Caldwell*, 954 F.2d 496, 505 (8th Cir.), cert denied, 506 U.S. 819, 113 S. Ct. 65, 121 L. Ed. 2d 32 (1992) (waiver of *Miranda* rights is determined under totality of the circumstances and entire course of police conduct) (citing *Oregon v. Elstad*, 470 U.S. 298, 318, 105 S. Ct. 1285, 1297, 84 L. Ed. 2d 222 (1985)).

In *United States v. Jones*, 23 F.3d 1307 (8th Cir. 1994), the court described the “two distinct dimensions” of the inquiry into the validity of a *Miranda* waiver:

“First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”

*Jones*, 23 F.3d at 1313 (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410 (1986)); see *Caldwell*, 954 F.2d at 504.

Only if the “totality of the circumstances surrounding the interrogation” reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

*Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410 (1986) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 2571, 61 L. Ed. 2d 197 (1979)).

In this case, the totality of the circumstances indicates Espinoza understood English sufficiently to waive his *Miranda* rights. He spoke in English. He never asked for an interpreter or indicated he had difficulty understanding the English language. All three officers testified regarding Espinoza’s proficiency in English, based on their observations of and conversations with him. The court holds, therefore, that Espinoza’s waiver of his rights was knowing and voluntary. See *United States v. Marrero*, 152 F.3d 1030, 1034 (8th Cir. 1998).

#### **IV. CONCLUSION**

For the reasons set forth above, **IT IS RECOMMENDED**, unless any party files objections<sup>8</sup> to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that Espinoza’s motion to suppress evidence (Doc. No. 10) be **denied**.

**IT IS SO ORDERED.**

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<sup>8</sup>Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).



**DATED** this 13th day of September, 2001.

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PAUL A. ZOSS  
MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT